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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SARIN THOEUR, Defendant and Appellant.	B209894 (Los Angeles County Super. Ct. No. NA070781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Sarin Thoeur of first degree murder (Pen. Code, § 187, subd. (a) [1]; count 1); three counts of willful, deliberate, and premeditated attempted murder (§§ 664/187, subd. (a); counts 2, 5, and 6); shooting at an occupied motor vehicle (§ 246; count 3); and assault with a firearm (§ 245, subd. (a)(2); count 4). The jury found true the special allegations that defendant committed each of the offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)); personally and intentionally discharged a firearm, a handgun, proximately causing great bodily injury in the commission of counts 1, 2, 5, and 6 (§ 12022.53, subd. (d)); and personally used a firearm in the commission of count 4 (§ 12022.5, subd. (a)). The trial court sentenced defendant to 185 years to life in state prison.

BACKGROUND

The offenses of which defendant was convicted took place on July 24, August 14, and September 8, 2005. In our recitation of the evidence, we set forth the relevant events by the dates they took place.

A. The July 24, 2005, Shooting – Counts One and Two

About 12:30 or 1:00 a.m. on July 24, 2005, Jean Betancourt and Juan Anguiano arrived at an Anguiano family baptism party hosted by Robert Anguiano at 1443 11th Street. Betancourt parked in the alley behind the house. When Betancourt and Juan Anguiano arrived, the party was concluding, so they decided to go elsewhere else and eat. Betancourt, Juan Anguiano, Juan's brother, his cousin, and Enrique Sanchez, walked into the alley and stood in front of Betancourt's car and talked for about 10 to 20 minutes.

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[1] All statutory citations are to the Penal Code unless otherwise noted.

As Betancourt's group stood in the alley, a group of three or four males walked through the alley past them and toward 11th Street. Betancourt did not recognize or focus on the males. Betancourt believed the males "[c]ould have been Latino probably." Robert Anguiano testified that he saw three Latino males enter the alley and that he did not pay attention to them.

Within 15 minutes, Betancourt and Robert Anguiano heard gunshots being fired. Betancourt was shot in the left chest, in and through his left arm, and in his right "pointer" finger. Betancourt was taken to the hospital where he remained for three days. Sanchez was shot in the lower back. The bullet caused two separate wounds. Sanchez died from the wound to his chest.

When Betancourt first heard the gunshots, he turned and saw three or four persons. It was difficult for Betancourt to determine how many persons were in the alley or to see their faces because it was dark, and the persons were wearing all dark colors. When he turned, Betancourt also saw "some red." He believed the red could have been a hat, a hood, a sweater, or something else. It was too dark for Betancourt to determine that person's sex or ethnicity. Betancourt had only a quick glance and could not say if the person had been among the group he had seen earlier, although he did not recall any of those persons having a red hat. Betancourt told the police he did not believe that the shooting was related to the earlier group because he did not recall anyone in that group wearing a red hat

Betancourt later testified that when he heard the gunshots, he turned and saw a person with a gun in his hand. Betancourt could not describe the person because it was dark. All he could see was "something red on the top." Betancourt then testified that he specifically recalled the person wearing a red baseball cap. At trial, Betancourt testified that it was too dark in the alley to tell if defendant was the person in the alley with the red hat.

Robert Anguiano testified that when he heard the gunshots and saw a flash, he saw a man in the alley. He did not see anyone else in the alley. He did not recognize the man. It was dark, and he could not see very well, but he described the man as not very

tall and "all in black." The man could have been African American, Latino, or Asian. The man's eyes were "kind of slanted like Asian eyes" and a little swollen.

The alley where the shooting took place is at the corner of 11th and Hoffman Streets. Johnny Hy, who testified at trial under a grant of immunity, testified that about a month or two before he was arrested on September 8, 2005, he witnessed a shooting in the area of 10th or 11th and Hoffman Streets. Hy had been walking home and stopped at the house of a friend nicknamed "Tigger" who lived near 10th and Hoffman Streets.[2] Hy smoked a cigarette in front of "Tigger's" house.

As he smoked his cigarette, Hy heard Mexican music and saw nicely dressed people. The people were Hispanic, and Hy believed they were attending a "church party" based on how they were dressed. The partygoers did not appear to be gang members.

At some point, Hy saw a dark green car he believed to be a Lexus parked about 100 feet from him.[3] Hy observed defendant and three other men get out of the car.[4] All of the men were dressed in black. Defendant was wearing a black "do rag" on his head. Defendant and the other men entered the alley, walking slowly and crouching down. Hy saw defendant draw a black, semi-automatic gun from his waist as he was entering the alley.

Within about two minutes, Hy heard in excess of 25 gunshots and saw defendant and the others running back to the car. Hy believed he saw defendant carrying the gun in his hand. The men got into the car and left. Two or three days later, defendant brought a newspaper article about the shooting to Hy's house. Defendant told Hy that he had done

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[2] Hy was a member of the Exotic Family City Crips gang. Tigger associated with the Tiny Rascals Gang, an enemy of Hy's gang.

[3] Hy initially identified the car to the police as a Lexus, then as a Toyota Camry.

[4] Hy testified that he saw about four men get out of the car. Hy told Long Beach Police Department Detective Daniel Mendoza that defendant and two others got out of the car.

the shooting. Hy did not tell defendant that he had been present and had seen defendant and his companions at the scene of the shooting.

Police collected 25 .9mm bullet casings from the scene. Most were recovered from the alley behind 1443 East 11th Street. The police unsuccessfully attempted to contact "Tigger," and were unable to locate his house.

B. The August 14, 2005, Shooting – Counts Five and Six

About 3:00 a.m. on August 14, 2005, Karlos Sanchez and his cousins, Hector and Eduardo Tapia[5], drove to the area of 15th and Linden in Long Beach to give a co-worker, Deanna Salaiz, a ride to another co-worker's house. As the four sat in Sanchez's car talking, one of Sanchez's cousins stated that a man was approaching. Sanchez saw three males with "hoody sweaters" over their heads approaching the car.

Sanchez resumed his conversation. Less than a minute later, one of Sanchez's cousins said, "Oh shit. They're coming." Sanchez then heard gunshots, but did not see anyone outside of the car with a gun. It sounded to Sanchez as if more than 38 shots were fired. Sanchez was struck five times and grazed "maybe" 10 times. Sanchez was taken to the hospital where he was in a coma for close to two weeks. Sanchez remained in the hospital for almost four months.

Salaiz testified that Sanchez said he was nervous because he had seen three males walking toward them. She looked up, and saw three Asian men running toward the car. The men were dressed alike – they all wore black beanies, white t-shirts, and brown khaki pants. The men were not wearing "hoody sweaters." One of the men had a ponytail, another had shoulder-length hair. When the men reached the car, they spread out – one stood in front of the car, one stood on the driver's side, and one stood on the passenger side.

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5 A Long Beach Police Department officer testified that Eduardo's last name is "Tapia." It appears that Sanchez misspoke at trial when he testified that his cousins' last name was Salaiz.

Salaiz saw two of the men pull out guns. Salaiz "hit the floor" and heard numerous gunshots. She felt bullets pass by and "shift" her hair, but she was hit only once, a bullet grazing her right hand. When the shooting stopped, Salaiz played dead because she heard "them" walking around the car. Then, she heard them running. Salaiz heard Eduardo say he had been shot in the leg. A Long Beach Police Department officer testified that he observed Eduardo at the hospital being treated for three gunshot wounds.

Salaiz attempted to drive Sanchez and Eduardo to the hospital, but Sanchez's car had four flat tires. A police officer saw Hector standing in the street with a bloody shirt and stopped. Hector directed the officer to Sanchez's car. The officer stopped Sanchez's car and, upon seeing Sanchez's wounds, requested medical attention. Paramedics transported Sanchez to the hospital. Before Sanchez was transported to the hospital, a police officer asked him who shot him. Initially, Sanchez said he did not know who shot him. A minute later, Sanchez said, "Two male Hispanics wearing black t-shirts and tan pants." The police collected evidence from the scene, including 29 .9mm brass bullet casings.

Salaiz told the police she might be able to identify two of the shooters. Salaiz believed she could identify the person in front of her and the person to her right side. Salaiz stared at the three men for from five to seven seconds as the men approached the car and before she ducked and the shooting started. The parties stipulated that Salaiz identified Jason Ra, a Tiny Rascals Gang member, at a field show-up at 5:50 a.m. on August 14, 2005. In identifying Ra, Salaiz stated, "That's one of them. That's the one who was walking on the left side. He was there. I don't know if he had a gun or not."

On September 25, a police officer showed Salaiz a photographic lineup that contained defendant's picture in position number three. Initially, Salaiz could not identify anyone "100 percent" because the persons in the photographs were not wearing beanies. The officer placed a piece of paper over the suspects' heads to simulate beanies and Salaiz identified defendant as the shooter who was to her left beside Sanchez. The person who had the ponytail stood in front of Salaiz. Salaiz wrote on the photographic lineup, "No. 3. He was there. He was the one on the left. I didn't see him with the gun."

C. The September 8, 2005, Shooting – Counts Three and Four

Sophal Chhun testified at trial under a grant of immunity. Chhun lived with his family in an apartment complex at 935 10 Street. About 10:00 p.m. on September 8, 2005, Chhun stood in the complex's courtyard, behind a gate, smoking a cigarette. Directly across the street from the courtyard was an auto body shop at the corner of 10th Street and Martin Luther King Boulevard. As he smoked his cigarette, Chhun saw defendant, whom he had known for 10 years, and Hy, whom he had known for six or seven months. Hy was fighting a male Hispanic as defendant and three or four other Hispanics watched. Chhun believed that two of the Hispanics were on bicycles. The fight was brief, lasting from 30 seconds to a minute.

When the fight concluded, Chhun headed back to his house. Chhun heard four or five gunshots and ran back to the gate. Chhun saw a white car or sport utility vehicle drive away and everyone else run. Defendant and Hy ran to Chhun's apartment complex. Defendant was holding a dark colored, semi-automatic handgun. Chhun had seen defendant carry the gun on prior occasions. Chhun, defendant, and Hy went inside Chhun's residence and into the garage.

Defendant said he wanted to use the bathroom to wash the gunpowder off his hands. When defendant came out of the bathroom, he told Chhun that he had urinated on his hands to get rid of the gunpowder. Defendant asked Chhun to hide the gun. Chhun hid the gun in a laundry basket in the closet in his little sister's room. Defendant and Chhun returned to the garage.

A few minutes later, the police arrived. Chhun's father consented to a search of the garage and other areas of the apartment, excluding his daughter's bedroom. Long Beach Police Department Detective Hector Gutierrez entered the garage and found Chhun, Hy, and defendant hiding. Defendant had a ponytail.

An officer asked Chhun if he knew anything about the shooting at the intersection of 10th Street and Martin Luther King Boulevard. Chhun said he did not. Chhun lied because he was afraid of being arrested. No weapons were found in the search of Chhun's house. Defendant and Hy were arrested.

The next day, Tony Tan, who associated with the Bitch Killers Gangster Crips gang, called Chhun about the gun. Tan held guns for various gangs and told Chhun that defendant had directed him to retrieve the gun. Tan went to Chhun's apartment. Chhun gave Tan the gun. Police later searched Tan's residence, but did not find the gun.

On October 20, 2005, the police returned to Chhun's house with a search warrant and arrested him. When the police interviewed Chhun at the police station, he told them a number of lies. Initially Chhun told the police that he was in his garage surfing the internet when defendant and Hy came over and told him that male Hispanics on bicycles "had ridden up and shot them." Chhun then told the police that he was standing on Martin Luther King Boulevard just north of 10th Street with defendant and Hy when he heard gunshots. Chhun saw four male Hispanics run across 10th Street and into the alley and Chhun, defendant, and Hy ran back to Chhun's apartment. Chhun then said that defendant and Hy came over to his house and told him about being involved in a shooting down the street. Chhun said that defendant had put the gun in a trash can behind Chhun's apartment complex and that he (Chhun) had retrieved it the next day and given it to Tan.

According to Chhun, the police told him that they did not believe him. The police told him that if he told them the truth, he would not be charged as an accessory.[6] Chhun told the police that defendant was responsible for the shooting at 10th Street and Martin Luther King Boulevard. The police released Chhun on October 22, 2005.

Hy lived next door to Chhun. According to Hy, during the evening on September 8, he and defendant went to the auto body shop across the street. There, defendant encountered three "white guys" on bicycles and asked them where they were from, an inquiry intended to determine whether they belonged to a gang. The three guys responded, "Krazy Youngsters" – the name of a gang – and a brief fistfight ensued between defendant and the "white guys."

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[6] Detective Mendoza, one of the detectives who interviewed Chhun, denied making any promises of leniency or offering Chhun any deals if Chhun spoke with him.

A car drove by, and someone in the car yelled "Fuck nips." The persons on bicycles were between defendant and the car. Defendant pulled a black, .9mm semi-automatic gun from his waist. Defendant shot at the car or the persons on the bicycles more than five times – Hy could not determine defendant's intended target given the relative positions of the car and the bicycle riders. Hy had seen defendant with the gun on prior occasions. After the shooting, Hy and defendant walked to Chhun's house. At some point, Hy heard defendant say, "I shot three times." Inside defendant's garage, defendant asked to use Chhun's bathroom, saying something like he wanted to wash off the gunpowder.

About 10:00 p.m. on September 8, 2005, Salvador Aguirre witnessed a brief fight between four men in front of the body shop at the corner of 10th Street and Martin Luther King Boulevard. One of the men had a bicycle. After the fight ended, two of the men got into a green sport utility vehicle – Aguirre believed the vehicle was an Expedition. The vehicle drove away, stopping at a red light on 10th Street. When the vehicle stopped, one of the men who had been involved in the fight fired a gun about six times at the vehicle. When asked where the person who had fired the gun went after the shooting stopped, Aguirre said, "they" went inside an apartment building at the corner.

Jennifer Crocker lived in a second floor apartment at 921 10th Street, near the intersection of 10th Street and Martin Luther King Boulevard. About 10:00 p.m. on September 8, 2005, Crocker heard between three and eight gunshots coming from that intersection. Crocker looked out a window and saw three males running. The males stopped below Crocker's window. One of the males had a short ponytail. Crocker heard one of the males say to the others, "I shot three times." Crocker did not know which of the males made that statement. Crocker did not see a gun in the hands of any of the males.

Crocker observed the males run to a nearby building where they stood outside of an apartment before entering. Crocker called 911. The police entered the apartment Crocker had seen the three males enter. Later, the police brought out two males who

resembled two of the males Crocker had seen earlier. One of the two males had a short pony tail.

Long Beach Police Department Officer Raymond Arcala recovered eight .9mm Luger casings near the auto body shop. The police did not locate the green vehicle or anyone who may have been shot during the event.

D. Ballistics Evidence

Long Beach Police Department criminalist Troy Ward analyzed the 27 .9mm Luger cartridge casings recovered from the scene of the July 24, 2005, shooting; the 29 .9mm Luger cartridge casings recovered from the scene of the August 14, 2005, shooting; and the eight .9mm cartridge casings recovered from the September 8, 2005, shooting. Criminalist Ward opined that the same firearm fired 11 of the cartridge casings recovered from the July 24 shooting, 12 of the cartridge casings recovered from the August 14 shooting, and all eight of the cartridge casings recovered from the September 8 shooting.

E. Gang Evidence

Defendant was a member of the Asian Boyz gang. Long Beach Police Department Detective Joe Pirooz testified that he had had contact with members of the Asian Boyz and investigated crimes committed by the gang's members. According to Detective Pirooz, the Asian Boyz's turf was on the East Side – the area east of the 710 and the Los Angeles River. The charged offenses in this case all occurred within the East Side of Long Beach.

The Asian Boyz's rival gangs were the Tiny Rascal gang, the Crazy Brotherhood Clan, the East Side and West Side Longo gangs, and Barrio Pobre. According to Detective Pirooz, there is a "race issue with respect to Asian gangs and Hispanics in general, not just Hispanic gangs."

Detective Pirooz testified that the primary activities of the Asian Boyz are burglaries, home invasion robberies, narcotics crimes, weapons crimes, assaults, and murder. In February 2003, Sam Heng, an Asian Boyz member, was convicted of

attempted murder and assault with a firearm. In November 2004, Sytha Seang, an Asian Boyz member, was convicted of attempted murder and multiple counts of assault with a semi-automatic firearm.

DISCUSSION

I. The Accomplice Instructions

Defendant contends that the trial court erred in failing to instruct the jury that it was to determine whether Hy was defendant's accomplice in the July 24, 2005, shooting and whether Hy or Chhun was defendant's accomplice in the September 8, 2005, shooting. The trial court further should have instructed the jury, defendant contends, that upon finding either Hy or Chhun to be an accomplice, the jury was to determine if independent evidence corroborated either's testimony.

A. Application of Relevant Legal Principles

Section 1111 provides, "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining 'accomplice.' [Citation.] It also must instruct that an accomplice's incriminating testimony must be viewed with caution [citation] and must be corroborated [citations]. If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury [citation]; otherwise, it must instruct the jury to determine whether the witness is an accomplice [citation]. [Citations.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.) "[I]f the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the

trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony. [Citation.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1114.)

To be chargeable as an accomplice, the witness must directly commit the act constituting the offense or aid or abet in its commission. (*People v. Avila* (2006) 38 Cal.4th 491, 564.) "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense." (*Ibid.*) A person's liability as an aider and abettor "depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. [Citation.] It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. [Citations.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) "In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33)." (*Ibid.*)

1. The July 24, 2005, shooting

It was dark in the alley behind 1443 11th Street during the early morning on July 24, 2005, and neither Betancourt nor Robert Anguiano was able to see well enough to identify any of the shooters. Defendant concedes that no direct evidence implicates Hy in the July 24, 2005, shooting, arguing instead that circumstantial evidence implicates Hy in the shooting.

Defendant contends that the jury did not have to take Hy's testimony at face value and that one could infer that Hy was one of the shooters based on Criminalist Ward's testimony that the bullet casings recovered from the scene came from three different weapons. The circumstantial evidence that defendant contends establishes Hy as a possible accomplice is: (a) Hy admittedly was present in the vicinity of the shooting, (b) Hy claimed to be visiting "Tigger," but testified that he did not know "Tigger's" true name or address, and the police failed to locate "Tigger" or "Tigger's" house, (c) Robert Anguiano described one of the perpetrators as having eyes that appeared to be Asian, a description, defendant contends, that would fit Hy, (d) Hy was able to describe what the partygoers were wearing, a fact he could not have perceived from his stated vantage

point, and (e) Hy did not tell defendant he had seen defendant at the scene of the shooting when defendant showed him the newspaper article about the shooting.

Defendant's theory of Hy's status as a potential accomplice is based on speculation. That Hy was present in the vicinity of the shooting does not tend to establish his involvement in the shooting. Witnesses to crimes are most often in the vicinity of the crimes. Likewise, Hy's failure to provide "Tigger's" true name or address and the failure of the police to determine the same does not tend to establish Hy's involvement in the shooting. At most, it establishes Hy's unwillingness to provide identifying information concerning his friend.

That Hy and one of the perpetrators both may have been Asian only remotely places Hy among the persons who might have been one of the perpetrators. Even if Hy was unable to see the partygoers and what they were wearing from the location where he smoked the cigarette, when confronted with this information, he explained that he had seen the partygoers "hanging out" in the alley when he walked past the alley. Defendant does not explain how Hy's failure to tell defendant when defendant showed him the newspaper article about the crime that he (Hy) had seen defendant at the scene establishes Hy's involvement in the shooting.

The ballistics evidence supports the theory that there were three shooters. As defendant states, a jury can reject any testimony. But, defendant fails to provide a reasonable theory why the jury in this case would have rejected Hy's testimony and found Hy to be one of the three shooters involved in the July 24, 2005, shooting. The evidence in this case is insufficient as a matter of law to support a finding that Hy was an accomplice in the July 25, 2005, shooting. Accordingly, the trial court did not need to instruct the jury on accomplice testimony with respect to Hy and the July 24, 2005, shooting. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114.)

2. The September 8, 2005, shooting

Assuming without deciding that there was sufficient evidence to justify accomplice instructions with respect to Chhun and Hy and the September 8, 2005,

shooting, defendant was not prejudiced by the omission of such instructions because Chhun's and Hy's testimony was sufficiently corroborated. "'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" . . . The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." [Citation.]' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 556.)

a. Hy's testimony

Hy testified that after someone yelled "Fuck nips" from the passing car, defendant pulled a black, .9mm semi-automatic gun from his waist and fired in excess of five shots. The prosecution presented evidence that corroborated this testimony. The police recovered eight .9mm cartridge cases from the September 8, 2005, shooting scene. All eight .9mm cartridge cases were fired from the same gun.

Hy further testified that after the shooting he and defendant walked or ran to Chhun's house. At some point, Hy heard defendant say, "I shot three times." The prosecution presented evidence that corroborated this testimony. Crocker testified that after hearing shots fired at the intersection of 10th Street and Martin Luther King Boulevard, she looked out her window and saw three males running. The males stopped below Crocker's window and Crocker heard one of the males say to the others, "I shot three times."

The ballistics evidence and Crocker's testimony were sufficient evidence to corroborate Hy's testimony implicating defendant in the September 8, 2005, shooting because that evidence tended to connect defendant with the crime in such a way as to satisfy the jury that Hy was telling the truth. (*People v. Brown, supra*, 31 Cal.4th at p. 556.)

b. Chhun's testimony

Chhun testified that as he stood in the courtyard of his apartment complex smoking a cigarette, he saw defendant and Hy across the street near the auto body shop. According to Chhun, Hy was fighting a male Hispanic. Defendant and additional male Hispanics, two of whom were on bicycles, watched the fight. The fight was brief, lasting from 30 seconds to a minute. When the fight concluded, Chhun heard four or five gunshots as he headed back to his house. Chhun testified that defendant and Hy ran to Chhun's apartment complex. Defendant was holding a handgun.

The prosecution presented evidence that corroborated Chhun's testimony. Aguirre testified that he witnessed a brief fight between four men in front of the body shop at the corner of 10th Street and Martin Luther King Boulevard. One of the men had a bicycle. After the fight ended, two of the men got into a green sport utility vehicle and drove away. One of the men who had been involved in the fight fired a gun about six times at the vehicle. According to Aguirre, after the shooting stopped, the person who had fired the gun and an apparent companion went inside an apartment building at the corner. Aguirre was unable to determine which apartment they went into.

Crocker testified that one of the men she saw running after the shooting had a short ponytail. Crocker saw that man and two others run to and enter an apartment in a nearby building. Later, Crocker observed the police enter that apartment and bring out two males who resembled the males she had seen earlier. One of the males had a short ponytail. The police entered and searched Chhun's apartment that night. The police arrested defendant who had a ponytail.

Although there are some differences in their testimony, Aguirre's and Crocker's testimony was sufficient evidence to corroborate Chhun's testimony implicating defendant in the September 8, 2005, shooting because their testimony tended to connect defendant with the crime in such a way as to satisfy the jury that Chhun was telling the truth. (*People v. Brown, supra,* 31 Cal.4th at p. 556.)

II. CALJIC No. 2.92

Defendant contends that, based on Salaiz's field identification of someone other than defendant as one of the August 14, 2005, shooters, the trial court erred "either by deleting from CALJIC No. 2.92 ('Factors to Consider in Proving Identity by Eyewitness Testimony') the phrase 'or physical' from the factor which, in the pattern instruction reads, '[w]hether the witness was able to identify the alleged perpetrator in a photographic or physical lineup,' or by failing to modify the instruction to include the factor of a witness previously identifying someone other than the defendant."[7] Defendant contends the trial court's error influenced the jury's assessment of the accuracy of Salaiz's identification thereby undermining the defense theory of the case and infringing on his substantial rights under the federal and state constitutions to a fair trial, a jury trial, and an accurate guilt determination by a properly instructed jury.

A. Background

Salaiz identified Ra at a field show-up at 5:50 a.m. on August 14, 2005. In identifying Ra, Salaiz stated, "That's one of them. That's the one who was walking on the left side. He was there. I don't know if he had a gun or not." On September 25, 2005, Salaiz identified defendant from a photographic lineup. Defendant's photograph was in position number three. Salaiz wrote on the photographic lineup, "No. 3. He was there. He was the one on the left. I didn't see him with the gun."

The trial court instructed the jury with CALJIC No. 2.92 (2.92) as follows (the trial court's contested omission appears in brackets and italics):

"Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the

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[7] Defendant suggests that the trial court could have modified the instruction to add as a factor for the jury's consideration "Whether on any occasion before trial the witness failed to identify the defendant or identified someone else as the offender."

eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

"The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

"The stress, if any, to which the witness was subjected at the time of the observation;

"The witness' ability, following the observation, to provide a description of the perpetrator of the act;

"The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

"The cross-racial or ethnic nature of the identification;

"The witness' capacity to make an identification;

"Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;

"Whether the witness was able to identify the alleged perpetrator in a photographic [*or physical*] lineup;

"The period of time between the alleged criminal act and the witness' identification;

"Whether the witness had prior contacts with the alleged perpetrator;

"The extent to which the witness is either certain or uncertain of the identification;

"Whether the witness' identification is in fact the product of [his]/[her] own recollection;

"and

"Any other evidence relating to the witness' ability to make an identification."

Defendant did not object to the trial court's modification or request any other modifications.

B. Forfeiture

Defendant concedes that he failed to object to 2.92 as given or to request its modification, but contends that his claim of instructional error is cognizable on appeal because the claim implicates his substantial rights. (§ 1259.)[8] Defendant argues that the modification of the instruction affected his substantial rights because it "deprived him of a fair jury trial by adversely affecting the jury's capacity to assess the accuracy of the identification evidence and make an accurate determination of his guilt."

"Normally, a defendant is held to waive the right to appeal alleged errors by failing to make an appropriate objection in the trial court; however, an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected. (Pen. Code, §§ 1259, 1469.) The cases equate 'substantial rights' with reversible error, i.e., did the error result in a miscarriage of justice? (Cal.Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)" (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) The trial court's modification of 2.92 did not affect defendant's substantial rights because the trial court's modification of the instruction was not reversible error.

When reviewing a claim that a jury instruction is erroneous, we consider "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) We view the challenged instruction in the context of the instructions as a whole (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), and "assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028). "An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10-11.)

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8 Section 1259 provides, in relevant part, that "[t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Defendant contends that the trial court's deletion of the phrase "or physical" from 2.92 was "highly significant" because Salaiz identified Ra as the shooter on her left in a physical lineup and later identified defendant from a photographic lineup as the shooter on her left. Defendant reasons that there is a strong inference from Salaiz's two identifications that her identifications pertained to the same individual and the trial court's modification of 2.92 rendered the instruction less responsive to the state of the evidence. Defendant further reasons that the trial court's modification deflected the jury's attention from the fact that Salaiz clearly identified someone other than him in a physical lineup as the shooter on the left.

The trial court properly modified 2.92. Defendant, not Ra, was the "alleged perpetrator" referred to in 2.92. Salaiz identified defendant from a photographic lineup, she did not identify him from a physical lineup. Accordingly the trial court properly deleted the phrase "or physical" from the challenged instruction. Moreover, the jury heard the parties' stipulation that less than three hours after the August 14, 2005, shooting Salaiz participated in a field show-up where she identified someone other than defendant – Ra – as the shooter on her left. The jury also heard Salaiz's testimony that six weeks after the shooting she identified defendant from a photographic lineup as the shooter on her left. We assume the jurors were intelligent people capable of understanding 2.92 and applying it to the evidence. (*People v. Richardson, supra*, 43 Cal.4th at p. 1028.) The trial court's modification of 2.92 was not reversible error and therefore did not affect defendant's substantial rights. Thus, defendant has forfeited review of this claim. (*People v. Arredondo, supra*, 52 Cal.App.3d at p. 978.)

C. Ineffective Assistance of Counsel

Defendant contends that if he is deemed to have forfeited review of his challenged to CALJIC No. 2.92 by defense counsel's failure to object to its modification or to request further modification, then defense counsel's performance was constitutionally deficient.

"'Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) "Generally, . . . prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster, supra*, 111 Cal.App.4th at p. 383.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The record on appeal does not reveal the reason defense counsel failed to object to the trial court's modification of 2.92 or to request a modification of that instruction. Accordingly, any claim of ineffective assistance with respect to these asserted deficiencies is better suited to a petition for writ of habeas corpus. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 267.)

III. Defendant's Claim That The Trial Court Abused Its Discretion In Admitting Evidence That Defendant Expressed A Desire To "Shank" Two Police Officers

Defendant claims that the trial court abused its discretion under Evidence Code sections 210 and 352 when it admitted Detective Joe Pirooz's testimony that defendant told Detective Pirooz that he would have "shanked" two police officers if he had known they were going to interview and arrest him for the charges in this case and that he wanted to do "something like that" because "It's my thing. It's the life I lead."[9]

A. Background

In a chambers conference while Detective Pirooz was on the witness stand, defense counsel objected to the admission of certain statements by defendant concerning his desire to "shank" a police officer on the grounds that the statements were irrelevant and violated Evidence Code section 352. Defense counsel explained that after defendant was arrested on September 8, 2005, he was sent to prison on a "violation." In July 2006, defendant was returned from prison to be booked and charged in this case. After defendant was booked and was being transferred, he said to Detective Pirooz something to the effect of "I wish I had a shank on me."

The trial court asked the prosecutor to explain the statement's relevance. The prosecutor stated that defendant was alleged to have committed a series of violent crimes and had made a statement about stabbing a police officer. The prosecutor stated that when Detective Pirooz asked defendant why he would want to do something like that, defendant responded, "It's the life I lead. It's my thing." The prosecutor argued that the statements related back to defendant's "violent nature as well as his gang culture, which is what . . . Detective [Pirooz] is on the stand discussing." The prosecutor further argued

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[9] To the extent that defendant's claims on appeal might be construed as contesting the admission of the challenged testimony as a violation of Evidence Code section 1101, a theory he did not raise in the trial court, any such claim would be forfeited. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 5.)

that the statements showed defendant's "motive and his violent nature, as well as his involvement with the gang life and it being his thing."

The trial court ruled, "When I look at 352, I have to say that clearly very prejudicial value, but the probative value outweighs the prejudicial effect. So under 352, I have to rule that it should come in."

The prosecutor then examined Detective Pirooz about defendant's booking in July 2006. According to Detective Pirooz, defendant asked him who had brought him to the station. Detective Pirooz told defendant that Mendoza and Gonzalez – presumably Detectives Mendoza and Gonzalez – had brought him. Defendant said that if he had known they were going to interview him and arrest him for the charges in this case, he would have "shanked" the detectives prior to questioning. When Detective Pirooz asked defendant why he would do such a thing, defendant responded, "It's my thing. It's the life I lead."

B. Relevant Legal Principles

Evidence Code section 210 provides, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We review for abuse of discretion a trial court's relevance determination and its decision to admit or exclude evidence under Evidence Code section 352. (*People v. Jablonski* (2006) 37 Cal.4th 774, 821, 824.) In determining whether the trial court abused its discretion in admitting defendant's statements, "we address two factors: (1) whether the [statements] were relevant under Evidence Code section 210, and (2) if they were relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the evidence was not substantially outweighed

by the probability that its admission would create a substantial danger of undue prejudice. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166 [32 Cal.Rptr.3d 759, 117 P.3d 476].)" (*People v. Hoyos* (2007) 41 Cal.4th 872, 908.) "Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) "'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant.'" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

"[T]he application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v.*] *Watson* [(1956)] 46 Cal.2d [818,] 836. [Citations.]" (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida, supra,* 37 Cal.4th at p. 439.) "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Ibid.*)

The trial court did not abuse its discretion in finding the evidence relevant. Defendant was charged with first degree murder; three counts of willful, deliberate, and premeditated attempted murder; shooting at an occupied motor vehicle; and assault with a firearm. The prosecution alleged that defendant committed each of the charged offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. Defendant's statement that he wanted to "shank" the officers who interviewed him about, and arrested him for, the alleged gang offenses demonstrates consciousness of guilt about those offenses. Defendant's statement that the reason he wanted to "shank" the officers investigating his alleged gang offenses was because that was his thing and the life he led – i.e., the gang life – was relevant to the gang enhancement allegations.

The trial court did not abuse its discretion in declining to exclude the evidence under Evidence Code section 352 because the statements' probative value was not substantially outweighed by the probability that their admission would create a substantial danger of undue prejudice. (*People v. Hoyos, supra,* 41 Cal.4th at p. 908.) That is, the statements' admission did not pose "an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla, supra,* 22 Cal.4th at p. 724.) The statements were not such that they would necessarily evoke an undue emotional bias against defendant. (*People v. Lenart, supra,* 32 Cal.4th at p. 1125.)

Moreover, even if the trial court erred in admitting Detective Pirooz's contested testimony, the erroneous admission of that testimony would not have rendered the trial fundamentally unfair. (*People v. Partida, supra,* 37 Cal.4th at p. 439.) Evidence that a gang member charged with a series of vicious crimes, including murder, expressed ill will towards the arresting police officer would have come as no surprise to, or have had any effect on, a reasonable juror. Indeed, evidence was presented that when defendant expected the police to come to his house in April 2004, he wore a t-shirt he had had specially prepared that bore the message "F the police." Absent fundamental unfairness, we determine whether the error was harmless applying the *Watson* standard. Substantial admissible evidence supported each of the charged offenses and gang enhancement allegations and, thus, it is not reasonably probable that defendant would have received a more favorable outcome if the trial court had not admitted Detective Pirooz's testimony. (*People v. Marks, supra,* 31 Cal.4th at pp. 226-227; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Accordingly, the trial court's admission of Detective Pirooz's contested testimony was harmless.

IV. Cumulative Error

Defendant contends that even if none of the issues addressed above warrants reversal of the judgment if considered individually, the cumulative prejudicial effect of those errors resulted in a miscarriage of justice that necessitates reversal of his convictions. The cumulative effect of any errors is harmless. Moreover, because we

reject each of defendant's contended errors, there is not cumulative prejudicial effect justifying reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.